

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 408 of 1980

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

RAJPAL JODHARAM KHIYALDAS SINDHI

Versus

MOMIN KARIMBHAI HAJI

Appearance:

MR PRASHANT G DESAI for appellant
MR BR SHAH for Respondent No. 1
RULE SERVED for Respondent No. 2, 3

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 07/09/2000

ORAL JUDGEMENT

This appeal arises of the judgment and order
dated 19th July, 1980, passed by the Joint District
Judge, Sabarkantha, in Civil Appeal No. 47/79, arising

of the judgment and decree passed by the learned Civil Judge (SD) Himatnagar, in Regular Civil Suit No. 80/74. The appellant before this court is the original defendant. The respondents-plaintiffs are the owners of shop no. 4/1017 on the first floor of a building situated at Station Road, Himatnagar. The defendant had purchased the shop no. 4/1007 on the ground floor of the said building and the corresponding shop on the first floor bearing No. 4/1016. Adjacent to the shop no. 4/1007 is a stair-case which the defendant claims to have purchased along with the shop, and according to the defendant the suit stair-case is of his exclusive ownership. The defendant, therefore, constructed another stair-case connecting his shop no. 4/1007 with the shop no. 4/1016, and attempted to remove the suit stair-case. Therefore, the suit. The plaintiff claimed that the suit stair-case was meant for the common use of all the occupants of the first floor of the building; the plaintiff had an access to the public road through the said stair-case, and prayed for a permanent injunction restraining the defendant from removing the suit stair-case and restraining him from obstructing any of the said occupants from using the suit stair-case.

The facts proved are - The suit building was constructed some time in the year 1936/1937, and was of common ownership of one family. The suit building is stretched North-South facing West. In the middle of the building, was a gate. Above the gate was a room (shop) which is now numbered as 4/1017 which has been purchased from the original owner by the plaintiff. On the Northern side of the gate are ten rooms (shops), five on the ground floor and five on the first floor. Similarly, on the Southern side of the gate are ten rooms (shops), five on the ground floor and five on the first floor. The said property was partitioned amongst the three brothers some time in the year 1939. Ten rooms (shops) on the Southern side of the gate (hereinafter referred to as 'the Southern wing') came to the share of one brother-the predecessor-in-title of the plaintiffs' vendor. Ten rooms (shops) on the Northern side of the gate (hereinafter referred to as 'the Northern wing') came to the share of other two brothers, one of whom was the predecessor-in-title of the vendor of the defendant. The middle room on the first floor i.e. shop no. 4/1017 and the gate beneath it were kept for common use. The said property was partitioned amongst the brothers in the year 1959. The shop No. 4/1017 fell to the share of the plaintiffs' vendor and the gate beneath it came to the share of the predecessor-in-title of the vendor of the

defendant. It appears that thereafter a shop has been constructed in the said portion which is numbered as 4/1016. Originally, the building had four stair-cases, two in each of the wing i.e. at either end of each wing there is a stair-case which were being used for the common purpose of all the occupants. Both the courts below having considered various sale-deeds and the statements made therein have held that all the four stair-cases including the suit stair-case were meant for common use of all the occupants and the suit stair-case was not of exclusive ownership of the defendant or his vendor as claimed. The trial court, therefore, decreed the suit which has been confirmed by the lower appellate court.

Mr. Desai has submitted that the entire suit is misconceived. He has read over the plaint and has contended that neither the plaintiff claimed the right of ownership nor a right of tenancy over the suit stair-case and only right he could have asserted was that of easement. He has submitted that the right of easement pre-supposes two distinct ownership which has not been established. Besides, it is not stated whether the plaintiff had a customary right of easement or a right of easement of necessity. He has submitted that at far ends of the building on the Northern side as well as on the Southern side, there are two stair-cases which are meant for the common use by all the occupants, and two stair-cases in the middle i.e. on the Southern side of the Northern wing and on the Northern side of the Southern wing are of exclusive ownership of the owners of the respective rooms. One of such rooms being No. 4/1007 has been purchased by the defendant along with the ownership right of the suit stair-case. Since the plaintiff has other access to his shop on the first floor, he can not claim right of easement of necessity over the suit stair-case. He has therefor relied upon sections 4, 5 and 13 of the Indian Easement Act, 1882. He has relied upon the judgments of this court in the matters of THE STATE OF GUJARAT VS HIRALAL MOTILAL LUHAR (AIR 1980, GUJ 146), and of BAI CHAMPA WD/O NATVARLAL MOHANLAL & ANR VS DWARKADAS MOHANLAL (X GLR, 965), and also upon the judgment of the Hon'ble Supreme Court in the matter of M/S ORIENT DISTRIBUTORS VS BANK OF INDIA LTD & ORS (AIR 1979, SC 867). He has submitted that both the courts below have failed to consider this salient feature of right of easement and the plaintiff should be held to have failed to prove his right of easement over the suit stair-case.

I am of the view that the argument is fallacious. The argument is based on a presumption that the defendant has purchased the shops nos. 4/1007 and 4/1016 along with the suit stair-case and that the defendant has an exclusive right over the suit stair-case. As I shall presently show the suit stair-case as well as other three stair-cases of the building were constructed for the common use by the occupants of the entire building and no occupant can claim exclusive right of ownership over any of the said stair-cases.

The shop no. 4/1017 was purchased by the plaintiff from one Alibhai Hajibhai Jethraji by sale-deed dated 18th June, 1974. It is stated in the said sale-deed (Ex-88) that the said shop had fallen to the share of the vendor in the family arrangement between the brothers and that the same was sold to the plaintiff in the year 1965 and the plaintiff having paid the full amount of consideration, the sale-deed was executed on 18th June, 1974. The said sale-deed refers to the suit stair-case and other stair-cases in the building as meant for common use by the occupants of the rooms in each of the wings. However, I am of the view that the statements made in the said sale-deed are post litem motam in as much as the same are made just four days before the date of the suit and are not admissible in evidence. With respect to the statements made post litem motam, the Hon'ble Supreme Court has in the matter of STATE OF BIHAR & ORS VS SRI RADHA KRISHNA SING & ORS (AIR 1983 SC 684) has held that " The admissibility of such declarations is, however, considerably weakened if it pertains not to public rights but to purely private rights. It is equally well settled that declarations or statements made post litem motam would not be admissible because in cases or proceedings taken or declarations made ante litem motam, the element of bias and concoction is eliminated. Before, however, the statements of the nature mentioned above can be admissible as being ante litem motam they must be not only before the actual existence of any controversy but they should be made even before the commencement of legal proceedings. ". The law on the point has been summarised by the Court as "statements, declarations or depositions etc would not be admissible if they are post litem motam". In the present case, obviously the statements in the sale-deed (Ex-88) were made after the cause of action arose. The same being post litem motam, are not admissible in evidence. But then, there is other evidence sufficient to hold that suit stair-case was meant for the common use of the

occupants of the Northern wing of the suit building and the occupants of the middle room bearing no. 4/1017 on the first floor of the suit building.

The family arrangement between the brothers in respect of the room No. 4/1017 and the gate beneath it, has been recorded in the account book (Ex.147). It appears that on settlement of accounts between the brothers by family arrangement made on 5th August,, 1959, room no. 4/1017 fell to the share of the vendor of the plaintiff and it clearly recites that the vendor of the plaintiff had a right to access to the said room through both the ladders in the middle of the building i.e. on the either side of the said room. Besides, the other sale-deeds Exs. 94, 95 and 96 in respect of different rooms on the first floor of the suit building executed by the respective owner in favour of the respective purchaser also recite a similar right. The said sale-deeds are of 1st November, 1957, of 26th March, 1968, and of 8th December, 1960 respectively. This fact has been proved by the oral evidence of the respective vendors also. Thus, the evidence on record leaves no doubt that both the stair-cases in each wing of suit building were meant for the common use by all the occupants of the rooms in the respective wing of the suit building and the occupants of the middle room No. 4/1017 had a right to access to and from the public road through both the stair-cases on either side of the gate (one of them being the suit stair-case). It is true that the sale-deed (Ex.135) under which the defendant purchased the shops nos. 4/1007 and 4/1016, does recite that the premises sold to the defendant included the suit stair-case. Similar statement has been made by the vendor Momin Ismail Daudbhai in his deposition. But it has been brought out in the cross-examination of the said witness that the daughter of the said witness was married in the family of the plaintiff and had a matrimonial problem . The testimony of the said witness in respect of the right to use of the said stair-case, therefore, can not be believed. Besides, once it is held that the plaintiff had a right to access through the suit stair-case, the vendor of the defendant could not have claimed exclusive right of ownership of the suit stair-case, nor could he have transferred the exclusive right of ownership to the defendant. In view of the above discussion, both the courts below have rightly decreed the suit.

Appeal is dismissed with costs.

(MS R.M.DOSHIT J)

JOSHI